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No. 07-414

FILED
NOV 23 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

In re: YORIE VON KAHL, et al.,
Petitioners.

ON PETITION FOR WRITS OF HABEAS CORPUS

PETITION FOR REHEARING

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES.....i
PETITION FOR REHEARING.....1
CERTIFICATE OF COUNSEL..... 6
CERTIFICATE OF SERVICE..... 7

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Ins. Co. v. Lavoie,
475 U.S. 813 (1986).... .....3, 4, 5
Boumediene v. Bush, _U.S , ___, 127
S.Ct. 1478, 167 L.Ed 2d 578 (2007).....4, 5
Eagles v. United States, 329 U.S. 304 (1946).....1
Ex parte Abernathy, 320 U.S. 219 (1943).....4
Ex parte Quirin, 317 U.S. 1 (1942)..... 5
Hawk v. Olsen, 326 U.S. 271 (1945).....3
Holiday v. Johnston, 313 U.S. 342 (1941).....2
In re Murchison, 349 U.S. 133 (1955).....3, 4, 5
INS v. Chadha, 462 U.S. 919 (1983)..... 5
Marbury v. Madison, 5 U.S. 137 (1803)..... 2-3
Marino v. Ragen, 332 U.S. 561 (1947)..... 4
McNett v. St. Louis & San Francisco Ry. Co.,
292 U.S. 230 (1934).....5
Nguyen v. United States, 539 U.S. 69 (2003).....2, 4

Offutt v. United States, 348 U.S. 11 (1954).....5
Reynolds v. Cochran, 365 U.S. 525 (1961).....3
Richardson v. United States, 526 U.S. 813 (1999)....6

Page(s)

Tarble's Case, 80 U.S. 397 (1871).....5
Testa v. Katt, 330 U.S. 386 (1947)..... 5
Wade v. Mayo, 334 U.S. 672 (1948).....4
Walker v. Johnston, 312 U.S. 275 (1941).....2
Wilwording v. Swenson, 404 U.S. 249 (1971).....4

STATUTES

28 U.S.C. § 1.....2
28 U.S.C. § 455(a).....3, 4, 5
28 U.S.C. § 1651.....1
28 U.S.C. § 2241.....1, 2, 3, 5, 6
28 U.S.C. § 2242..... 3

COURT RULES

S.Ct.R. 4.2..... 2
S.Ct.R. 20.4..... 2
S.Ct.R. 44.1.....6
S.Ct. R. 44.2..... 5, 6

SECONDARY SOURCES

66 A.B.A.J. 721 (1980), "What Really Goes on at the Supreme Court"..... 2
"Sunshine in the Third Branch," 16 Washburn L. Rev. 559 (1977)..... 2
Supreme Court Practice, Stern, Gressman, Shapiro & Geller (BNA 7th ed. 1993)..... 1, 2

Petitioners request that this Court grant their petition for rehearing of the Court's order denying Petitioners' Petition for Writs of Habeas Corpus. Petitioners contend that the law did not permit the Court to dispose of Petitioners' habeas corpus petition in a secret "conference," the Court's denial and the district courts' conflict of interest require Petitioners to seek relief in state courts, and/or the Court should have transferred the Petition to the district courts pursuant to 28 U.S.C. § 2241(b).

First, Petitioners contend that the Court's consideration of their Petition in secret conference was unlawful. This Court or some person within this Court's supervisory powers apparently filed, docketed and scheduled the Petition for a "conference," which was purportedly held on October 26, 2007. Thereafter, the petition was "denied." Such a practice, respecting rights, remedies and powers protected, provided, and/or prohibited by the Constitution and laws enacted pursuant thereto, renders such "conferences" in respect to the Great Writ followed by arbitrary denials constitutionally suspect.

No statute appears to authorize this Court to delay an application for a writ of habeas corpus by ordering such application to a "conference." The power to issue such writ is clear. 28 U.S.C. §§ 2241(a), 1651(a). "Secrecy and anonymity are not congenial to our traditions of procedure . . . ." *Eagles v. United States*, 329 U.S. 304, 315 (1946). In this case, someone unknown to Petitioners or the public denied rights and remedies that involve the highest possible considerations of the Judicial Branch by a "private conference" that was "confidential." Supreme Court Practice, 7th ed., Stern, Gressman,

Shapiro & Geller, 6, 7 n.22 (BNA 1993)(quoting Justice Rehnquist from Sunshine in the Third Branch, 16 Washburn L. Rev. 559, 559-60 n.1 (1977), and Justice Powell, What Really Goes On at the Supreme Court, 66 A.B.A.J. 721, 722 (1980)).

The "conference" is a practice - at least in habeas corpus cases - not sanctioned by law. In *Holiday v. Johnston*, 313 U.S. 342 (1941), this Court condemned the practice of permitting Commissioners to hear and dispose of habeas corpus petitions as clearly in violation of the statutory procedure for hearing habeas corpus petitions despite the procedure being permitted by court rules and being more convenient. *Id.* at 352-54; *see, also, Walker v. Johnston*, 312 U.S. 275, 285-87 (1941).

The instant habeas corpus petition was denied after this private and confidential conference. This petition was not filed for determination by any single Justice. The Petitioners sought issuance of the writs by the United States Supreme Court but this denial in secret conference as action of the Court apparently violates the quorum requirements and is without authority. 28 U.S.C. § 1; S.Ct.R. 4.2; *Nguyen v. United States*, 539 U.S. 69, 82-83 (2003).

Petitioners properly invoked the jurisdiction of this Court to review their commitment orders and imprisonment and fully stated the reasons for not making the application to the district court of the district in which the applicant is held. 28 U.S.C. § 2241; S.Ct.R. 20.4. Both the Constitution and law restrict and govern this Court's discretion, without which its actions are *ultra vires. Marbury v. Madison*, 5 U.S. 137, 176-180 (1803)(Constitution "establish[es] . . . limits not to be transcended by...departments" of Government and is

"instrument as a rule for the government of courts, as well as of the legislature" any act contrary to which is "void").

Congress has permitted this Court or any justice thereof (when application is made thereto) to "decline to entertain an application for a writ of habeas corpus **and** [to] transfer the application for hearing and determination to the district court having jurisdiction to entertain it."[1] 28 U.S.C. § 2241(b). Petitioners complied fully with the requirements of 28 U.S.C. § 2242, and asserted numerous extraordinary circumstances establishing overwhelming reasons for not applying to any district court in the first instance. The reasons included effects upon tens of thousands of federal prisoners (if not far more), potentially millions of people, foreign citizens and international relations with the United States, and at least a publicly perceived (if not actual) conflict of interest in district court judges, precluding them from hearing the claims as a matter of law (28 U.S.C. § 455(a)), and by constitutional constraint. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986); *In re Murchison*, 349 U.S. 133, 136 (1955).

The conflict of interest matter is so devastating in light of Petitioners' claims, which at this time "must be accepted as true," [2] that every federal criminal proceeding now underway is without jurisdiction in the respective district courts. No habeas corpus case before this Court has ever been

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[1] If this Court determines that the district courts do not have a conflict of interest, then Petitioners' application should be transferred to the district courts with jurisdiction, instead of simply denying the writs.

[2] *Reynolds v. Cochran*, 365 U.S. 525, 528 (1961); *Hawk v. Olsen*, 326 U.S. 271, 273 (1945)

more urgent to the national and international interests of the United States.

Under the facts alleged, it is virtually impossible that "an adequate remedy may be had in a lower court." *Ex parte Abernathy*, 320 U.S. 219, 220 (1943). Compelling district judges to hear the application in light of the clear conflict of interest would not merely preclude "an adequate remedy" in the district courts, *Abernathy*, 320 U.S. at 20; it would turn any such remedy into an unconstitutional proceeding. *See Aetna*, 475 U.S., at 828; *Murchison*, 349 U.S. at 136. "Good judicial administration is not furthered by insistence on futile procedure." *Wade v. Mayo*, 334 U.S. 672, 681 (1948); *Nguyen*, 539 U.S. at 78. *Cf. Wilwording v. Swenson*, 404 U.S. 249, 251-51 (1971)(per curiam)("The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of . . . separate remedies when at the outset a petitioner cannot intelligently select the proper way, and in conclusion he may find that none of the [alternatives] is appropriate or effective.")(quoting *Marino v. Ragen*, 332 U.S. 561, 568 (1947)); *Boumediene v. Bush*, __U.S , ___, 127 S.Ct. 1478, 167 L.Ed 2d 578, 580 (April 7, 2007)(Breyer, J., dissenting). Finally, the conflict of interest allegations would not disappear by forcing the application upon conflicted judges. Instead, it would force severe and serious delay to address the statutory (28 U.S.C. § 455(a)) and constitutional prescriptions and arguably suspend the privilege for an indeterminate period.

Since the district judges are barred from hearing petitioners' claims and this Court refuses to do so, Petitioners may have to resort to the only remaining available courts, *i.e.*, the courts of the

several states, to pursue their constitutional protections, which would be contrary to controlling precedent. *Tarble's Case*, 80 U.S. 397, 411 (1871)("no just reason to believe that [federal judicial officers] will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in [habeas] cases than would be that of State tribunals and State officers."). *Cf. Testa v. Katt*, 330 U.S. 386, 390-94, n.6-8 (1947)(state courts must enforce federal statutes); *McNett v. St. Louis & San Francisco Ry. Co.*, 292 U.S. 230, 233-34 (1934)(same).

The "public importance of the questions raised...and the duty which rests on the courts...to preserve unimpaired the constitutional safeguards of civil liberty, and . . . the public interest require[s] that [this Court] consider and decide those questions without any unavoidable delay." *Ex parte Quirin*, 317 U.S. 1, 19 (1942). *Cf. INS v. Chadha*, 462 U.S. 919, 936-37 (1983); *Boumediene,* 167 L.Ed 2d at 1479-81.

Thus, because good grounds precluding transfer to any district court has been positively asserted, it appears that 28 U.S.C. § 2241(b)'s discretion is precluded on the presumptively true facts of this case. Regardless, such discretion is limited to declining to entertain the application and transfer to a district court. That cannot be done without violating 28 U.S.C. § 455(a) and/or arguably violating due process of law. *Aetna*, 475 U.S. 813, 824-25 (1986); *Murchison*, 349 U.S. 133, 136 (1955); *Offutt v. United States*, 348 U.S. 11, 14 (1954). Thus, this Court's avoidance canon, if not § 455 and due process of their own force, precludes the district

courts from hearing the petition. *Richardson v. United States*, 526 U.S. 813, 830 (1999).

However, in the event the Court decides that the district courts are not precluded from hearing the petition, the Court should transfer the petition to the appropriate district courts for hearing and determination as required by 28 U.S.C. § 2241(b).

Accordingly, petitioners submit that they have demonstrated sufficient grounds pursuant to S.Ct. R. 44.2 that should grant a rehearing of their petition, or, alternatively, that the Court should transfer the petitions to the appropriate district courts.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that this petition for rehearing is restricted to the grounds specified in S.Ct.R. 44.1 and that it is presented in good faith and not for delay.

RALPH C. BUSS
Counsel of Record

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of this Petition have been sent by Regular Mail, Postage Prepaid, to: Paul D. Clement, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20503-0001; Peter D. Keisler, Acting Attorney General, U.S. Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20503; Harley Lappin, Director, Bureau of Prisons, Central Office, 320 First St., N.W., Washington, D.C. 20534; and R.V. Veach, Warden, USP Terre Haute, U.S. Penitentiary, 4700 Bureau Rd. South, Terre Haute, IN 47802, this 11th day of December 2007.

RALPH C. BUSS
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